



Kenya Hotel Properties Limited v Attorney General & another; Willesden Investments Limited & 2 others (Interested Parties) (Petition 438 of 2015) [2016] KEHC 7271 (KLR) (Constitutional and Human Rights) (15 June 2016) (Ruling)

Kenya Hotel Properties Limited v Attorney General & 4 others [2016] eKLR

Neutral citation: [2016] KEHC 7271 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 438 OF 2015

I LENAOLA, J

JUNE 15, 2016

BETWEEN

KENYA HOTEL PROPERTIES LIMITED PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

JUDICIAL SERVICE COMMISSION 2ND RESPONDENT

AND

WILLESDEN INVESTMENTS LIMITED INTERESTED PARTY

ETHICS & ANTI-CORRUPTION COMMISSION INTERESTED PARTY

KENYA REVENUE AUTHORITY INTERESTED PARTY

RULING

Introduction

1. In its Notice of Motion Application dated 11th April, 2016 the Applicant seeks the following orders:
 - i) That pending the determination of this Petition an injunction be issued restraining the 1st and 3rd Interested parties, their servants or agents from executing the decree in any manner whatsoever in Milimani HCCC No. 367 of 2000 Willesden Investments v Kenya Hotel Properties Limited and calling up the bank guarantee issued by Development Bank of Kenya Limited.



- ii) That the Judges and Magistrates Vetting board be ordered to furnish copies of all the Hansard Proceedings concerning Honorable Justice Emmanuel Okelo O’Kubasu to the Petitioner’s advocates within 10 days of the order of this Court.
- iii) That this Court certify that the Petition raises a substantial question of law and should be heard by an uneven number of judges being not less than three assigned by the Honorable Chief Justice.
- iv) That this Court be pleased to grant any other orders in the interest of justice.
- v) Costs be in the Petition.

The present Ruling is however limited to prayer (iii) of the Application only.

Petitioner/Applicant’s Case

2. The Application is supported by the Affidavit of Marianne Ndegwa Jordan dated 15th October 2015. The grounds in support thereof are as follows:
 - i) Following the dismissal of an application seeking conservatory orders in Petition No. 13 of 2011 Kenya Hotel Properties Limited v The Attorney General & Others the Petitioner successfully obtained a stay on 4th April 2013 in the Court of Appeal in Civil Application No.24 of 2012 Kenya Hotels Properties Limited v Willesden Investments Limited & Others preventing the execution of the decree;
 - ii) In the event the appeal is unsuccessful, the stay will be set aside and it’s therefore in the interest of justice to obtain an injunction pending the determination of this Petition to avoid rushing back to court and seeking a stay in the unforeseen future;
 - iii) The Judges and Magistrates Vetting Board had in the past refused to answer correspondence and provide copies of the Hansard proceedings and the same are required for the proper and just consideration of the issues raised in the Petition;
 - iv) The Petition raises novel issues arising from the removal of a judge through the vetting process; and
 - v) The Court should consider referring the matter to the honorable Chief Justice to consider empaneling an uneven number of judge to determine the issue raised."
3. It is my observation that the Petitioner’s/Applicant’s case is generally centered on the right to a fair hearing as prescribed in Article 50 of the Constitution, 2010 And the Petitioner/Applicant relies on the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & Two Others (Application No. 2 of 2011), particularly the opinion rendered by Mutunga, CJ who stated that the right to fair trial, Applied to everyone regardless of whether the right was denied due to the misconduct of judges who voluntarily or involuntarily left the bench.
4. Additionally, in following the decision in Protus Shikuku v R, Constitutional Reference No. 3 of 2011, [2012] eKLR the Petitioner/Applicant submits that the learned judges of the Court rightly held that the High Court had the jurisdiction to redress a violation that arose from the operation of the law through the system of the courts regardless of whether the case had gone through an appellate process.
5. In sum, the Petitioner’s/Applicant’s case is also aligned on the Vetting Board’s decision to declare that Hon. Justice O’ Kubasu (rtd) was not suitable to hold the office of a judge and that it was he who had



delivered the judgment in issue and dismissed Kenya Hotel Properties Limited v Willesden Investments Limited [2011] eKLR. subject of the present Petition.

Respondents Case

6. The 2nd Respondent is opposed to prayer (iii) of the Application seeking to empanel an uneven number of judges and in summary, its response is premised on the following grounds:

That the High Court does not have jurisdiction to reopen cases that have already been determined by the Court of Appeal; That there is no basis in law for this matter to be referred to the Chief Justice to empanel bench and a single judge is capable of determining the Petition; That there is a pending judgment in the Court of Appeal which if determined in favor of the Petitioner will bring an end to the protracted litigation.

7. The 2nd Respondent further cites the following cases in line with the grounds above:

- a) Hon Justice Chemut & Others v The Attorney General [Pet No. 307 of 2012] where Justice Majanja stated that:

If I were to accept the above dicta, then it would follow, that every question concerning our constitution would be substantial question of Law. Each case that deals with the interpretation of the Constitution or our expanded Bill of Rights would be a substantial question of law as it is a matter of public interest, affects the rights of the parties, is fairly novel and has not been the subject of pronouncement by the highest Court. This would burden judicial resources to the extent that the value of obtaining justice without delay under Article 159(2) (b) would be imperilled.”

Bidco Oil Refineries Limited v Attorney General & 3 Others [2013] eKLR Justice Majanja opined that: In my view although the issues raised by the applicants are weighty, I do not think that they raise any novel issues of law or matters of law that require the court to tread new ground to the extent that I would consider that this matter raises substantial questions of law.”

Gilbert Mwangi Njugua v Attorney General [2011] eKLR:..I have also considered the submissions of the petitioner with regard to the remedies sought. Weighed against the yardstick of what constitutes a “substantial question of law” the issues may indeed be substantial and of great public interest. However, in my view, they do not merit hearing by an uneven number of judges and can be adequately dealt with by a single judge.”

8. There are no submissions or responses from the 1st & 3rd Respondent.

Interested Parties

9. The 1st Interested Party on its part submits that the Application is without merit and asserts the following with regard thereof:

That the grounds stated in the Application do not fall within the respect of such certification; That there are no novel issues arising in the matter from the removal of a judge through the vetting process; No substantive issues arise in these proceedings which are an



abuse of process, frivolous and which are in the face of numerous decisions of several courts; and That the grounds are frivolous within the law that has been set out.

Determination

10. The issue to be determined is whether the Petition herein raises substantial questions of law for this court to invoke Article 165(4) of the Constitution. That Article provides as follows;
 - 1) ...
 - 2) ...
 - 3) ...
 - 4) Any matter certified by the Court as raising a substantial question of law under clause(3) (b) or (d) shall be heard by an uneven number of Judges, being not less than three, assigned by the Chief Justice.
 - 5) ...
 - 6) ...
 - 7) ...”
11. The question regarding the circumstances under which a matter should be referred to the Chief Justice under Article 165(4) was considered inter alia in the case of Community Advocacy and Awareness Trust and Others vs Attorney General Nairobi Petition No.243 of 2011 (Unreported), where Majanja J noted that:

The Constitution of Kenya does not define, “substantial question of law.” It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine a matter [10]... giving meaning to “substantial question” must take into account the provisions of the Constitution and need to dispense justice without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter.” (Emphasis mine).
12. The Courts, in interpreting this provision have also taken the view that referral thereto is a matter of discretion and therefore subject to a number of other criterion. The leading authority in this particular instance is the case of Chunilal Mehta vs Century Spinning and Manufacturing Co. AIR 1962, where the Supreme Court of India stated that:

A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial.”
13. Further, in Martin Nyaga and Others v Speaker County Assembly of Embu and 4 Others and Amicus [2014] eKLR it was stated that some of the applicable principles are;



14. It is the view of this Court that while the above principles are a general guide on what a Judge should consider in any application under Article 165(4), each case ought to be looked at in its unique circumstances so as to establish what entails a substantial question of law.
15. That is why for example in Harrison Kinyanjui vs. Attorney General & Another [2012] Majanja, J opined thus:

The meaning of ‘substantial question’ must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter.” (Emphasis mine).
16. Applying the foregoing principles to the present matter, the core of the Petition revolves around alleged judicial bias, and particularly the alleged infringement of Article 50 as regards the Petitioner’s right to a fair hearing under the Constitution, 2010.
17. Article 165(4) of the Constitution and the decisions above stipulate circumstances under which the Chief Justice can exercise his powers under that Article. It is a requirement that the substantial question of law which justifies the invocation of the said provision must either be where the Court is required to make a determination of the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or a determination in respect of a question respecting the interpretation of the Constitution.
18. Upon the perusal of the Petition herein and in the above context, it is my view that the simple issue raised in the Petition is whether upon removal of the Hon. Justice O’Kubasu, all his decisions as a Judge were thereby rendered null and void. That issue was once addressed by the Supreme Court in Rai vs. Rai Petition No.4 of 2012 and Samuel Kamau Macharia (supra). The question is therefore neither novel nor weighty.
19. It is also my view that a matter regarding the application of Article 50 on the right to a fair trial is not weighty in the circumstances and can be expeditiously addressed by a single Judge.
20. With respect to the Petitioner/Applicant therefore, there is no reason why the Petition should be determined by more than one Judge and in fact no substantial question of Law is apparent at all.
21. In the event, Prayer (iii) of the Application dated 11th April, 2016 is hereby dismissed. Let the remainder of the Application proceed for hearing immediately.
22. Each party will bear its own costs.
23. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 15th DAY OF JUNE, 2016

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 16TH DAY OF JUNE, 2016

ONGUTO L. J.

JUDGE

In the presence of:

Richard – Court clerk



Mr. Obura for Gichuhi for Petitioner

Mr. Oduor holding brief for Mr. Oyatta for 1st Interested party

Mr. Ado holding brief Githuku for 3rd Interested Party

No appearance for Respondents

Court

Ruling delivered/read as already signed on behalf of Lenaola J.

ONGUTO J. L.

JUDGE

